SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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H.H. **Part CVA-R**
Index No. 54039/2020
Plaintiff, **Mot. Seq. No. 003**

-against-

THE SALESIANS OF DON BOSCO, a/k/a
THE SALESIAN SOCIETY, **DECISION AND ORDER**

Defendants.

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LEONARD D. STEINMAN, J.

The following papers, in addition to any memoranda of law and/or statement of material facts, were reviewed in preparing this Decision and Order:

Defendant's Notice of Motion, Affirmation & Exhibits……...…...1
Plaintiff's Affirmation in Opposition & Exhibits.....2
Defendant's Reply.....3

In this action, plaintiff alleges that he was sexually abused when he was 10 years old during the summer of 1970 while at a sleep away camp in Goshen, New York managed by defendant The Salesians of Don Bosco. He testified that while he was initially sleeping during one of the first nights at the camp he was sexually abused by Brother George Puello, a group leader at the camp. The next day plaintiff went to the infirmary feigning illness to get away from Puello, where he spent the night. At the infirmary he was abused by Brother Thomas Brown, the doctor in charge of the infirmary, after he informed Brown of Puello's abuse.[1] The Salesians now move for summary judgment pursuant to CPLR 3212 dismissing the complaint on the ground that it had no notice of any propensity of the brothers to sexually abuse campers. For the reasons set forth below, the motion is granted.

[1] Plaintiff also alleges that a few weeks later he was abused by an unidentified visiting priest at the camp.

LEGAL ANALYSIS

It is the movant who has the burden to establish an entitlement to summary judgment as a matter of law. *Ferrante v. American Lung Assn*., 90 N.Y.2d 623 (1997). "CPLR §3212(b) requires the proponent of a motion for summary judgment to demonstrate the absence of genuine issues of material facts on every relevant issue raised by the pleadings, including any affirmative defenses." *Stone v. Continental Ins. Co*., 234 A.D.2d 282, 284 (2d Dept. 1996). Where the movant fails to meet its initial burden, the motion for summary judgment should be denied. *U.S. Bank N.A. v. Weinman,* 123 A.D.3d 1108 (2d Dept. 2014).

A defendant's burden cannot be satisfied merely by pointing to gaps in the plaintiff's proof. *In re New York City Asbestos Litigation* (*Carriero)*, 174 A.D.3d 461 (1st Dept. 2019); *Vittorio v. U-Haul Co.*, 52 A.D.3d 823 (2d Dept. 2008).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc*., 46 N.Y.2d 1065 (1979).

Plaintiff asserts claims for negligent hiring, retention and supervision (First Cause of Action); negligence, gross negligence and reckless misconduct (Second Cause of Action); and breach of duty *in loco parentis* (Third Cause of Action).

There is no separate cognizable claim for a breach of duty *in loco parentis*. *Doe v. Hauppauge Union Free School Dist.*, 213 A.D.3d 809, 810 (2d Dept. 2023). As a result, this claim must be dismissed.

A necessary element of a cause of action alleging negligent retention or supervision of an employee is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury. *Johansmeyer v. New York City Dept. of Educ.*, 165 A.D.3d at 635. The employer's negligence lies in having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring and retention of the employee. *Id.* at 635-36.

Similarly where, as here, a complaint also alleges negligent supervision of a child stemming from injuries related to an individual's intentional acts, "the plaintiff generally must demonstrate that the school knew or should have known of the individual's propensity to engage in such conduct, such that the individual's acts could be anticipated or were foreseeable." *Nevaeh T. v. City of New York*, 132 A.D.3d 840, 842 (2d Dept. 2015), *quoting Timothy Mc. v. Beacon City Sch. Dist*., 127 A.D.3d 826, 828 (2d Dept. 2015); *see also Mirand v. City of New York*, 84 N.Y.2d at 49. "[S]chools and camps owe a duty to supervise their charges and will only be held liable for foreseeable injuries proximately caused by the absence of adequate supervision." *Osmanzai v. Sports and Arts in Schools Foundation, Inc.*, 116 A.D.3d 937 (2d Dept. 2014); *see also Doe v. Whitney*, 8 A.D.3d 610, 611 (2d Dept. 2004).

The Salesians have satisfied its *prima facie* burden by setting forth the evidence available that it received no allegation of abuse concerning Puello or Brown prior to plaintiff's alleged abuse in 1970, as evidenced by the lack of any such allegations in their personnel files. [2]

Although in a typical circumstance the absence of a complaint in a personnel file may not satisfy a defendant's *prima facie* burden, institutional defendants in Child Victim Act (CVA) cases not infrequently find themselves unable to locate material documents related to the hiring, supervision and retention of employees. This action, like many CVA actions, relates to events that occurred decades ago—here, over half a century ago. Witnesses who could otherwise testify to events from long ago are no longer employed, impossible to locate or deceased.

The summary judgment analysis employed by New York courts is a judicial procedural construct. *See Yun Tung Chow v. Reckitt & Colman, Inc.*, 17 N.Y.3d 29, 35-36 (2011)(Smith, J. concurrence). Its purpose, as with all interpretations of the requirements of New York's Civil Practice Law and Rules, is meant "to secure the just, speedy and inexpensive determination" of civil proceedings. CPLR §104. But it would not be just to require a defendant to incur the cost, time and effort to defend an action at trial because, through no fault of its own, time has swept away the proof needed to prevail on summary judgment. Nor are victims benefitted by

[2] The Salesians subsequently identified Puello on its website as someone against whom there exists "plausible accusations of sexual abuse with a minor." Plaintiff has been unable to identify his third abuser and the Salesians cannot be expected to establish that it lacked knowledge that an unknown priest had a propensity to abuse children.

prolonging the inevitable dismissal of their suit and requiring their participation in emotionally gut-wrenching trials they cannot win. Granting summary judgment is also consistent with the Legislature's intent that CVA actions be timely adjudicated (as evidenced by its directive that the Chief Administrator of the Courts promulgate rules for the timely adjudication of revived claims). *See* Judiciary Law §219-d.

By weeding out factually insufficient claims and defenses, summary judgment serves as an important tool for accomplishing the primary goal of the CPLR as spelled out in CPLR §104. *See* One Step Forward, Two Steps Back: Summary Judgment After Celotex, 40 Hastings L.J 53 (1988)(referring to Fed. R. Civ. P. 1, substantively identical to CPLR §104). In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Supreme Court held that Rule 56 of the Federal Rules of Civil Procedure—the Federal Rules' equivalent to CPLR 3212—"mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party"s case, and on which that party will bear the burden of proof at trial." *Id*. at 322. "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id*. at 322-23. The Court further explained that the summary judgment rule "must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Id.* at 327.

Our courts are faced with a daunting backlog of actions waiting to be tried. No salutary purpose is served by piling on to this backlog revived cases that cannot be proved. It most certainly does not advance the principles upon which the CVA was based, and the rationale of *Celotex* is particularly applicable under the unique circumstances of this case. A just determination can be reached now without putting the litigants through more heartache, delay and expense.

Plaintiff has failed to raise an issue of fact with respect to whether The Salesians had actual or constructive notice that Puello or Brown had a propensity to commit sexual abuse.

Although plaintiff seeks to rely upon the fact that he reported Puello's abuse to Brown, that knowledge cannot be imputed to The Salesians because Brown was not acting in The Salesians' behalf when he failed to act on this knowledge but instead promptly abused plaintiff himself. *See A.M. v. Holy Resurrection Greek Orthodox Church of Brookville*, 190 A.D.3d 470 (1st Dept. 2021); *see also Center v. Hampton Affiliates, Inc.*, 66 N.Y.2d 782 (1985)(knowledge of faithless agent not imputed to principal where agent totally abandons his principal's interests and acts entirely for his own purposes).

As a result, The Salesians are entitled to summary judgment and the action is dismissed.

Any relief not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: June 1, 2023
Mineola, New York

ENTER:

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LEONARD D. STEINMAN, J.S.C.
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